FILED
MAY 8 1970
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 1548

JOSEPH MAIORANI,
Petitioner,

-against-

KAWASAKI KISEN K.K., KOBE,
Respondent,

-against-

PITTSTON STEVEDORING CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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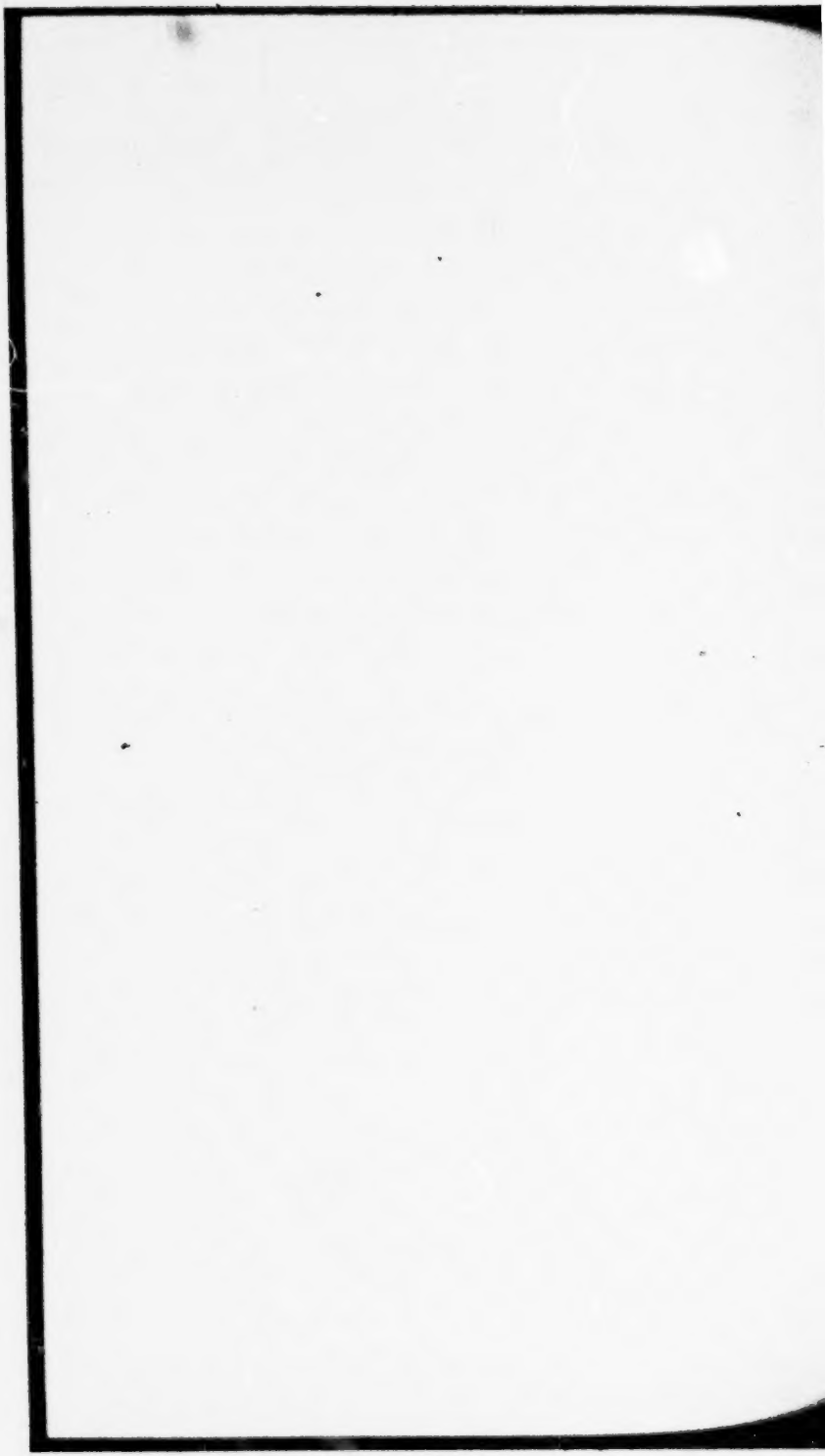

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No.

JOSEPH MAIORANI,

Petitioner,

-against-

KAWASAKI KISEN K.K., KOBE,

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PITTSTON STEVEDORING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 30, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, F.2d and the opinion and order of the United States District Court for the Southern District of New York (MacMahon, D.J.) denying petitioner's motion pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure to vacate the judgment are printed in full as part of the appendix to this petition. The action was originally dismissed by Hon. Lloyd F. MacMahon from the Bench when the case was called for trial.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 30, 1970. A petition for rehearing and rehearing in banc was filed which petition was denied by orders dated February 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Is a cause of action which has been diligently prosecuted until it is reached for trial subject to dismissal on the merits if plaintiff's counsel fails to personally attend by reason of other legal engagement when the Clerk of the Court gives one and one-half hours notice to appear for trail?

REASONS FOR GRANTING THE WRIT

Every lawyer is subject to call in more than one case for the same time which places every litigant throughout the country in every case in danger of losing his day in Court on the merits by reason of conflicting Court commitments of his attorney.

The protection of this Court is sought to prevent such injustice.

The decision by the Court below exposes every litigant in our Federal Courts to the loss of his day in Court on technical grounds over which neither the litigant nor his attorney has control.

STATEMENT OF THE CASE

On the 21st day of March, 1963, petitioner was operating a hi-lo in the #2 hold of the M.S. KAMIKAWA MARU when the steering wheel suddenly went out of control, causing injuries to petitioner's right hand (A 37).*

The aforementioned accident was caused by the deck being encumbered by timbers, one of which wedged into the rear wheel of the hi-lo (the rear wheels being the part of the hi-lo which controls the steering), causing the steering wheel to spin and the accident to occur as described (A 36-37).

The case worked itself up the Jury Personal Injury Calendar of the United States District Court for the Southern District of New York until it reached the position of being #3 of the "pool calendar" on the 21st day of March, 1969 (A53).

On or about that date, petitioner's counsel applied for an adjournment until April 15, 1969 based on the fact that he was scheduled to try a case in Panama and that defense counsel expected to be out of New York from April 3rd to April 11th, 1969. The request for adjournment was based on stipulation of all counsel concerned and was so ordered by

---

* References are to pages in Petitioner's Appendix in the United States Court of Appeals.

District Judge Pollack. The stipulation is set forth below in full:

[TITLE]

"U.S. Dist. Court
Filed Apr. 15, 1969
SD of NY

65 Civ. 3169
STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that an order may be entered adjourning the above entitled action to April 15, 1969, to hold its place on the Ready Day Calendar of the Civil Trial Pool without further notice.

Dated: New York, N.Y.
March 21, 1969.

S/JACOB RASSNER
S/KIRLIN, CAMPBELL & KEATING
S/FOLEY, GRAINGER & DARBY

SO ORDERED: Mar. 25, 1969.
S/ MILTON POLLACK,
U.S.D.J."

It should be noted that this case was to hold its place on the calendar of April 15, 1969. That is, it was to appear as case No. 3. It was not actually scheduled for trial that day.

The heading which is printed in the New York Law Journal above the jury trial pool list reads in part as follows:

"The cases listed below are assigned to a Jury Trial Pool . . . to be tried one to follow the other in the order

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listed before any Judge of the Court. . . . . ."

On April 15, 1969, the Clerk telephoned all counsel at 10:00 a.m. and directed them to appear for trial at 11:30 a.m. (A 54).

As petitioner's counsel had not received a call on April 14th for trial on April 15th, he went to Mobile, Alabama to attend a deposition with expected return to New York the night of April 15th (A 31-32).

Petitioner, who had been instructed to keep in daily contact with counsel's office, had telephoned on April 14th and was told by someone in counsel's office to call back the next day, that is, April 15th for further instructions (A 38).

George G. Kilarjian, Esq., an associate of Mr. Rassner, appeared before Judge MacMahon on April 15th, explained the circumstances and requested a short adjournment, which request was denied and the case dismissed.

A motion pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure for an order vacating the order of dismissal was made which motion was denied.

ARGUMENT

The Court below cited and apparently relied on the case of *Link v. Wabash Railroad Company,* 370 U.S. 626, 82 S. Ct. 1386 (1962) in reaching its decision.

The facts in the *Link* case, supra, warranted a dismissal by reason of "earlier delays" as well as the failure of plaintiff's counsel to appear, which is diametrically contrary to the facts in the case at bar.

This Court stated the basis of the dismissal in the following language which appears at page 634:

> "We need not decide whether unexplained absence from a pretrial conference would *alone* justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of plaintiff. For the District Court in this case relief on *all* the circumstances that were brought to its attention, including the earlier delays.[11]" (Emphasis supplied)

The denial to petitioner in the instant case of a trial on the merits was based on a failure to appear on one occasion after one and a half hours notice by the Clerk, while petitioner's counsel was actually engaged for one day in a deposition at Mobile, Alabama in a case pending in the Southern District of New York. The instant case was #3 on the calendar for that day.

There were no earlier delays occasioned by the petitioner or petitioner's counsel. The action was diligently prosecuted and petitioner himself was actually ready to proceed to trial.

There was not the slightest evidence of dilatoriness on the part of petitioner or failure to prosecute on the part of petitioner's counsel.

Common sense and logic justified petitioner's counsel's opinion that he would have plenty of time to conclude the deposition before the Trial Court finished two prior cases.

The *Link* case, supra, cited by the Court below in support of its decision expresses a view in conflict with the decision by this Court, which has expressly stated that facts such as in the instant case would not alone justify a dismissal.

In the case of *Napolitano v. Compania Sud-Americana de Vapores,* (docket #33960-33961, decided January 26, 1970),

the United States Court of Appeals for the Second Circuit considered another decision by District Judge MacMahon which was somewhat similar to the case at bar. In that case, the Court stated:

> "Moreover, we do not think it amiss to indicate that if these recurrent occurrences which to date we have been constrained to view as not being abuses of discretion continue to recur we may find it necessary to consider wuch a pattern of conduct as detrimental to the administration of justice despite a trial judge's conscientious belief that he is facilitating it."

The imperative need for this Honorable Court's consideration of the question presented is highlighted by the foregoing observation by the lower Court calling for restraint in dismissing cases followed by inactivity in enforcing its suggested restraint when trial on the merits is denied.

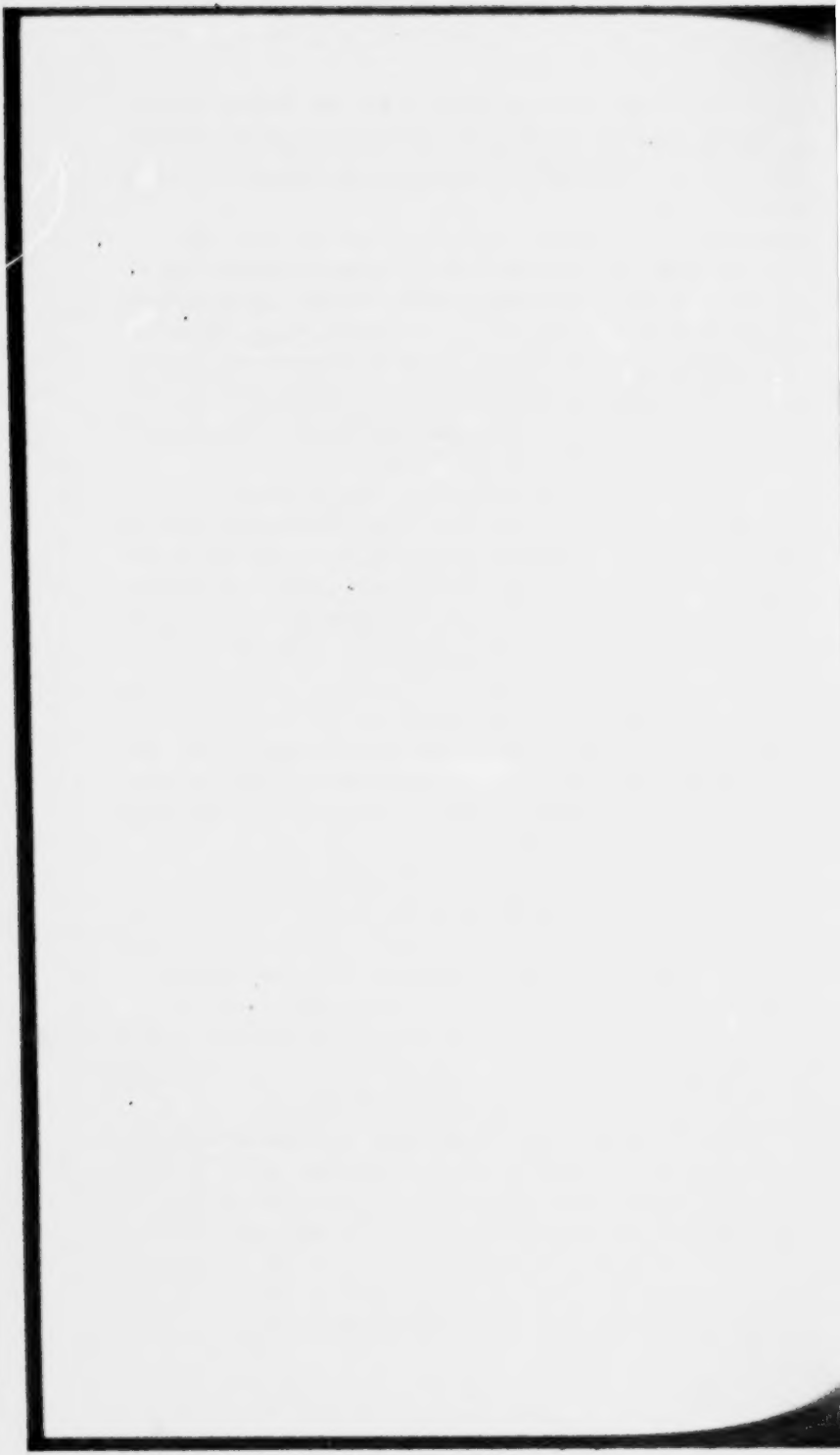
In the light of the expression by this Court in *Link*, supra, a denial of a trial on the merits under the circumstances set forth and the importance of the question involved, it is respectfully submitted that this case should be reviewed by this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner



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APPENDICES

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Appendix E - Opinion and Order of United States District Court for Southern District of New York . E-1

APPENDIX A

33487

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Joseph Mairorani,
Plaintiff-Appellant,

v.

Kawasaki Kisen K.K. Kobe,
Defendant and Third-Party
Plaintiff-Appellant,

Pittston Stevedoring Corp.,
Third-Party Defendant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Leonard P. Moore

Henry J. Friendly

February 24, 1970

Circuit Judges

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APPENDIX B

33487

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Joseph Maiorani,

Plaintiff-Appellant,

v.

Kawasaki Kisen K.K. Kobe,

Defendant and Third-Party
Plaintiff-Appellant,

Pittston Stevedoring Corp.,

Third-Party Defendant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff- appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petiton be and it hereby is denied.

J. EDWARD LUMBARD

Chief Judge

February 24, 1970

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
S E C O N D C I R C U I T

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of January one thousand nine hundred and seventy.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYES,

Circuit Judges.

- -

Joseph Maiorani,

Plaintiff-Appellant,

v.

Kawasaki Kisen K.K. Kobe,

Defendant and Third-Party
Plaintiff-Appellant,

Pittston Stevedoring Corp.,

Third-Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant, Joseph Maiorani.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 479—September Term, 1969.

(Submitted January 21, 1970 Decided January 30, 1970.)

Docket No. 33487

JOSEPH MAIORANI,

Appellant,

—against—

KAWASAKI KISEN K. K., KOBE,

Appellee and Cross Appellant,

—against—

PITTSTON STEVEDORING CORPORATION,

Appellee.

Before:

MOORE, FRIENDLY and HAYS,

Circuit Judges.

Appeal from orders of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* dismissing a longshoreman's personal injury action against a shipowner for want of prosecution and refusing to set the dismissal aside. Affirmed.

JACOB RASSNER, Esq., New York, New York (Bernard Shafter, Esq., New York, New York, of Counsel), *for Appellant.*

DANIEL J. DOUGHERTY, Esq. (Kirlin Campbell & Keating, New York, New York and James R. Campbell, Esq., of Counsel), *for Appellee and Cross-Appellant.*

JOSEPH GRAINGER, Esq. (Foley, Grainger & Darby, New York, New York, of Counsel), *for Appellee.*

PER CURIAM:

Plaintiff, a longshoreman, appeals from orders dismissing his personal injury action against a shipowner for want of prosecution and refusing to set the dismissal aside. The facts that occasioned the dismissal are stated in detail in an opinion of Judge MacMahon; we limit ourselves to the essentials:

The injury occurred in March, 1963. Action was brought on October 21, 1965. A pretrial order was entered on August 8, 1968, and the case was placed on the ready calendar. Commencing February 5, 1969, the case appeared in the New York Law Journal as in the jury trial pool, below a notice warning that "this calendar moves very rapidly" and that "attorneys are directed to be ready to proceed to trial upon a telephone call from the Deputy Clerk." See Calendar Rule 8(b). When the case had advanced to Number 3, plaintiff's lead counsel, Jacob Rassner, Esq., applied on March 21 for an adjournment because he would be engaged in litigation outside the United States from March 24 to March 31. Upon a stipulation that an order might be entered adjourning the action "to

April 15, 1969, to hold its place on the Ready Day Calendar of the Civil Trial Pool . . .," the judge in charge of the jury trial pool granted the application, and the deputy clerk advised counsel that the case would be tried on April 15 or very shortly thereafter. The deputy clerk telephoned them at 10:00 A.M. on April 15 and directed them to appear for trial at 11:30 A.M. The case was called at 12:15 P.M.; counsel for the shipowner and the impleaded stevedore were present and ready. An attorney from Mr. Rassner's office sought a two-day adjournment because Mr. Rassner had gone to Mobile, Alabama, to take a deposition in another case. When the judge indicated that plaintiff must proceed or have his action dismissed, the attorney stated he was not prepared to try the case. There followed an order of dismissal, which the judge later declined to vacate.

On these facts we perceive no abuse of discretion by the trial judge, quite apart from his further finding that a review of the files showed there were other attorneys who had acted for plaintiff and could have conducted the trial. Counsel, who had been once accorded the courtesy of an adjournment because of a conflicting professional engagement, was on notice that the action would be reached for trial on April 15 or shortly thereafter. He deliberately absented himself without any request for a further adjournment under Calendar Rule 7(b)(1). When a case has reached this stage, counsel cannot make himself unavailable, even temporarily, without providing a stand-by, as the trial judge thought he in fact had done. Opposing counsel, their witnesses, and parties to other cases awaiting trial have rights too, and the client is not without a remedy. *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 n. 10 (1962).

Affirmed.

APPENDIX E

Opinion and Order of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

JOSEPH MAIORANI,

Plaintiff,

-against-

KAWASKI KISEN K.K. : KOBE,

Defendant and Third-Party Plaintiff,

-against-

PITTSTON STEVEDORING CORP.,

Third-Party Defendant.

65 Civ. 3169

Copy No. 35921

U.S. District Court
FILED
JUN 5 1968
10:30 AM
S.D. OF N.Y.

- -

MacMAHON, District Judge.

Plaintiff moves under Rule 60(b), Fed. R. Civ. P., to vacate and set aside a judgment entered against him for failure to prosecute. Rule 41(b), Fed. R. Civ. P.

This action arises from a superficial injury to plaintiff's right hand which he claims to have suffered on board defendant third-party plaintiff's vessel on March 21, 1963.

The action was commenced on October 21, 1965, two years and seven months after the accident. After a delay of another two years, counsel certified that the action was ready for trial[1] and placed it on the trial calendar on August 4, 1967. After still another year's delay, a pretrial order was entered on August 8, 1968, and the action was placed on the ready calendar. The case was assigned to the jury trial pool on January 30, 1969. Commencing on February 5, 1969, it appeared in the New York Law Journal as case number 28 in the pool, below a notice which read as follows:

> "The cases listed below are assigned to a Jury Trial Pool ... to be tried one to follow the other in the order listed before any judge of the Court. This calendar moves very rapidly. Attorneys are directed to be ready to proceed to trial upon a telephone call from the Deputy Clerk, who will notify attorneys when and where to appear."

When this case had advanced to Number 3 in the pool, Jacob Rassner, Esq., plaintiff's counsel, applied on March 21, 1969 for an adjournment because he would be engaged in litigation outside the United States from March 24 to March 31, 1969. Judge Pollack, who was in charge of the jury trial pool in March 1969, granted the application and adjourned the case until April 15, 1969, the date Mr. Rassner requested, presumably because he had no conflicting engagements and would not subsequently become otherwise engaged on that date. When the Deputy Clerk informed Mr. Rassner that the case had been adjourned, the Clerk made it clear that the case would be tried on April 15, 1969 or very shortly thereafter.

The Deputy Clerk telephoned all counsel on April 15, 1969, at 10:00 A.M., and directed them to appear before us for trial at 11:30 A.M. When the case was called at 12:15 P.M., counsel for defendant third-party plaintiff and third-party defendant were present and ready for trial.

Plaintiff's counsel, however, did not appear. Instead an attorney from his office, George G. Kilarjian, Esq., appeared and applied for yet another adjournment, because now Mr. Rassner was taking a deposition in Mobile, Alabama. Mr. Kilarjian then informed us that he was not prepared to try the case. Defendant third-party plaintiff moved to dismiss, and we granted the motion.

Three attorneys submit affidavits on plaintiff's behalf. They contend: (1) that plaintiff was forced to go to trial on one hour's notice; (2) that only Mr. Rassner was able to try the case and (3) that plaintiff has no other redress for the underlying meritorious claim.

As to the first contention, that plaintiff was forced to go to trial on one hour's notice, plaintiff argues that the Calendar Rules of this Court provide for twenty-four hours' notice prior to trial. As we have explained on many other occasions,[2] Calendar Rules 6(d) and 7(b)(1), which mandate that cases be ready to proceed on twenty-four hours' notice, apply only to the movement of a case from the Ready Day Calendar to a judge's trial calendar or to a jury pool. Once a case is placed on a judge's trial calendar or in the pool, counsel are not entitled to twenty-four hours' notice but only to such notice as enables them to reach Court in time for trial.[3] The rules of this Court, coupled with the notice published in the Law Journal, put counsel on notice to be prepared to commence trial forthwith upon receiving telephonic notice. The alternative to the courtesy of telephone notice is to require counsel, parties and witnesses to come to the Courthouse and wait there until the case is reached, so that judges and juries will be kept employed moving this Court's congested calendar, instead of sitting around idly waiting for counsel, parties and witnesses.

Counsel's assertion that he received only one hour's notice is simply untrue. Mr. Rassner, himself, more than three

weeks before April 15, 1969, requested that the case be adjourned to the head of the jury trial pool for April 15, where, as the notice plainly reads, it could be reached on that date or shortly thereafter. The Deputy Clerk, also, orally informed Mr. Rassner's office that the case would be tried on April 15 or shortly thereafter. These uncontroverted facts make clear that Mr. Rassner had much more than one hour's notice; in fact, he had more than three weeks' notice.

The second contention, that Mr. Rassner was the only attorney able to try this case, is not in accord with the record facts. A review of the file reveals the names of four attorneys, other than Mr. Rassner, who were involved in this case and either purported to have, or evidenced, a working knowledge of the facts of this rather routine case.

The designation of trial counsel, for example, listed "Jacob Rassner or one of his associates." Bernard Shafter, Esq. appears on a number of papers as the attorney for plaintiff and prepared discovery motions on plaintiff's behalf. These motions were made on the basis of affidavits submitted by yet another attorney, Ernest Rassner, Esq. The affidavits evidence a great deal of familiarity with the facts. Mr. Kilarjian appeared on the day of trial and subsequently filed affidavits in support of the instant motion. Finally, Alfred Shafter, Esq. claims that he is presently plaintiff's attorney. We must, therefore, reject the argument that Mr. Rassner was the only attorney who could try this case.

The third contention, that our dismissal leaves plaintiff without a remedy for the underlying meritorious claim, is also rejected. There are some 12,000 other litigants, civil and criminal, awaiting trial in this Court, some of them sitting in jail, and their right to a speedy trial is being jeopardized, if not denied, by delay occasioned by attorneys "otherwise engaged" or parties eager to postpone indefinitely the day of reckoning.

We realize that dismissal is a harsh sanction,[4] but if we seriously intend to effectuate the right to a speedy trial and to realize our goal of current callendars, then we must enforce the rules of this Court.[5]

Plaintiff is not without a remedy. Where "an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice."[6]

Accordingly, plaintiff's motion to vacate and set aside the judgment entered against him is denied.

So ordered.

Dated: New York, N.Y.
June 4, 1969

/s/ Lloyd F. MacMahon

United States District Judge

FOOTNOTES

[1]See Calendar Rule 5.

[2]*Quagliano v. United States,* 293 F. Supp. 670 (S.D.N.Y. 1968); *Vitarelle v. Long Island R.R.,* 45 F.R.D. 474 (S.D.N.Y. 1968).

[3]Calendar Rule 8(b).

[4]*Schwarz v. United States,* 384 F.2d 833, 836 (2d Cir. 1967).

[5]See *Davis v. United Fruit Co.,* 402 F.2d 328 (2d Cir. 1968), *cert. denied,* 393 U.S. 1085 (1969).

[6]*Link v. Wabash R.R.,* 370 U.S. 626, 634 n. 10 (1962).